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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

In re BRANDON J., a Person Coming Under
the Juvenile Court Law.

C041651

THE PEOPLE,

(Super. Ct. No.
PJ0737)

Plaintiff and Respondent,

v.

BRANDON J.,

Defendant and Appellant.

After striking his brother on the head with a flashlight, which caused a laceration four inches long and one-quarter inch wide, Brandon J., a minor, admitted committing battery with serious bodily injury. (Pen. Code, § 243, subd. (d).) He was declared a ward of the court and camp placement was ordered. Following the minor's failure in several camp programs, he was committed to the California Youth Authority (CYA). The committing offense was the section 243, subdivision (d)

violation, which the court determined was a Welfare and Institutions Code section 707, subdivision (b) (hereafter Welfare and Institutions Code section 707(b)) offense.

After receiving the minor, the CYA sent the juvenile court a letter requesting that the Welfare and Institutions Code section 707(b) designation be removed because Penal Code section 243, subdivision (d) was not a listed offense. The court declined the request, finding that section 243, subdivision (d) came within section 707(b)(14): "Assault by any means of force likely to produce great bodily injury."¹ The minor appeals, contending the court erred in making this finding.

DISCUSSION

When the juvenile court commits a ward to the CYA, it must determine whether the committing offense is listed in Welfare and Institutions Code section 707(b). (Cal. Rules of Court, rule 1494(c) ["Order of commitment to the Youth Authority shall specify if the offense is one listed in section 707(b)"].) This determination has significant consequences. If the committing offense is listed, the CYA may maintain control over the ward until he or she attains 25 years of age; if the offense is not listed, the ward must be discharged by the CYA upon the

¹ In its letter to the CYA, the court explained: "An assault is legally included in a battery and the actual infliction of serious bodily injury certainly includes the means of force to accomplish that injury. So, there is no need to change the existing court order in this case."

expiration of either two years of control or attainment of the ward's 21st birthday, whichever occurs later. (Welf. & Inst. Code, § 1769.)²

Relying on *In re Jensen* (2001) 92 Cal.App.4th 262 (*Jensen*) and *People v. Fountain* (2000) 82 Cal.App.4th 61 (*Fountain*), the minor argues that battery with serious bodily injury (Pen. Code, § 243, subd. (d)) cannot be an offense listed in Welfare and Institutions Code section 707(b)(14) because (1) serious bodily injury resulting from battery does not necessarily imply that the force used to inflict the injury was force likely to produce great bodily injury; (2) the court may not look to the conduct underlying the section 243, subdivision (d) finding to determine whether the force used was likely to produce great bodily injury; and (3) it cannot be inferred that the Legislature

² Welfare and Institutions Code section 1769 provides:
“(a) Every person committed to the Department of the Youth Authority by a juvenile court shall, except as provided in subdivision (b), be discharged upon the expiration of a two-year period of control or when the person reaches his or her 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800). [¶] (b) Every person committed to the Department of the Youth Authority by a juvenile court who has been found to be a person described in Section 602 by reason of the violation of any of the offenses listed in subdivision (b), paragraph (2) of subdivision (d), or subdivision (e) of Section 707, shall be discharged upon the expiration of a two-year period of control or when the person reaches his or her 25th birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800).”

intended that section 243, subdivision (d) be included in section 707(b) (14).

Insofar as *Jensen* and *Fountain* are analogous to the minor's circumstances, we conclude they tend to defeat rather than support his position.

Jensen and *Fountain* each involved a determination whether a defendant's prior juvenile court adjudication of a felony offense constituted a strike under the "three strikes" law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) As pertinent to this appeal, for a prior juvenile adjudication of a criminal offense to constitute a strike, it must satisfy both paragraphs (B) and (D) of Penal Code section 667, subdivision (d) (3).³ "Under paragraph (B), a prior juvenile adjudication qualifies as a prior felony conviction for Three Strikes purposes only if the prior offense is listed in Welfare and Institutions Code section 707(b) or is classified as 'serious' or 'violent.'"

³ In relevant part, Penal Code section 667 provides: "(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: [¶] . . . [¶] (3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

Paragraph (D) does not modify or conflict with paragraph (B), but states a separate, additional requirement: the prior adjudication qualifies as a prior felony conviction only if the defendant, in the prior juvenile proceeding, was adjudged a ward because of at least one offense listed in section 707(b)."

(*People v. Garcia* (1999) 21 Cal.4th 1, 13.)

In *Fountain*, the prior juvenile offense at issue was battery with serious bodily injury. (Pen. Code, § 243, subd. (d).) We concluded this offense did not necessarily mean that force likely to cause serious bodily injury was employed, and thus section 243, subdivision (d) was not necessarily included in Welfare and Institutions Code section 707(b)(14) -- "Assault by any means of force likely to produce great bodily injury." (*Fountain, supra*, 82 Cal.App.4th at p. 69.) As an example, we noted that where a defendant simply pushed another, thereby causing the latter to fall and suffer great bodily injury, but the nature of the push was not such that great bodily injury would normally be expected, the offense would not fall within Welfare and Institutions Code section 707(b)(14). (*Fountain, supra*, 82 Cal.App.4th at p. 69.) Then, without differentiating between paragraphs (B) and (D) of Penal Code section 667, subdivision (d)(3), we stated that the court could go behind the record and look at the defendant's conduct to determine whether it brought the section 243, subdivision (d) offense within section 707(b)(14). (*Fountain, supra*, 82 Cal.App.4th at p. 68.)

In *Jensen*, the defendant's prior juvenile offense was voluntary manslaughter. (Pen. Code, § 192, subd. (a).) The *Jensen* court stated it had "no quarrel with the proposition that a trial court can go behind the bare juvenile adjudication to determine whether it is a qualifying offense -- that is, whether it meets the requirement of paragraph (B) [of Penal Code section 667, subd. (d)(3)]." (*Jensen, supra*, 92 Cal.App.4th at p. 268.) However, as to whether paragraph (D)'s requirement that the defendant had been adjudged a ward of the court based upon an offense listed in Welfare and Institutions Code section 707(b) had been met, *Jensen* concluded the trial court was not permitted to look to the defendant's conduct to make that determination.⁴ (*Jensen, supra*, 92 Cal.App.4th at p. 268.)

⁴ In concluding the trial court could not go behind the record to determine whether the requirements of paragraph (D) had been met, *Jensen* reasoned as follows: "Regardless of whether *Jensen's* conduct also constituted a Welfare and Institutions Code section 707(b) offense, the juvenile petition did not allege assault by any means of force likely to produce great bodily injury, and no true finding was made on such an offense. In other words, *Jensen* was *not* 'adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because' he committed an assault by any means likely to produce great bodily injury. ([Pen. Code,] § 667, subd. (d)(3)(D).) Paragraph (D) requires an adjudication of a Welfare and Institutions Code section 707(b) offense; a showing the conduct includes the elements of such an offense is not adequate. Because the requirement of paragraph (D) was not satisfied, *Jensen's* prior adjudication does not qualify as a strike." (*Jensen, supra*, 92 Cal.App.4th at p. 266.) *Jensen* further stated that to the extent *Fountain* could be read as permitting the trial court to go behind the record of the adjudication to determine whether paragraph (D) of section 667,

Neither Welfare and Institutions Code section 1769 nor California Rules of Court, rule 1494(c) mandates the "separate additional requirement" of paragraph (D) of Penal Code section 667, subdivision (d)(3) that the minor was adjudged a ward based upon an offense listed in Welfare and Institutions Code section 707(b). Instead, the only determination required by section 1769 and rule 1494(c) is the same as that required by paragraph (B) of section 667, subdivision (d)(3), to wit, whether the offense is listed in section 707(b). Since *Jensen* and *Fountain* both agree that the court may look behind the record of the juvenile adjudication to make this determination, these cases are contrary to the minor's position.

Directly on point, however, is *In re Gary B.* (1998) 61 Cal.App.4th 844 (*Gary B.*). Gary B. admitted a charge of robbery and agreed to a five-year term of commitment to the CYA in exchange for the dismissal of, inter alia, a personal firearm use enhancement. (*Id.* at p. 847.) At the time of Gary B.'s offense, armed robbery was a Welfare and Institutions Code section 707(b) offense, but unconditioned robbery was not. (*Gary B., supra*, 61 Cal.App.4th at pp. 847-848.) At the disposition hearing, the court rejected the minor's argument that it could not go beyond the circumstances of his admission to determine whether, in compliance with California Rules of

subdivision (d)(3) had been met, it disagreed with *Fountain*. (*Jensen, supra*, 92 Cal.App.4th at p. 268.)

Court, rule 1494(c), his offense was listed in section 707(b).
(*Gary B.*, *supra*, 61 Cal.App.4th at p. 848.)

The Court of Appeal upheld the juvenile court's determination, reasoning the legislative scheme required that in determining the appropriate disposition for the minor, "the court's 'judgment and order' must be based on all the relevant and material evidence before it, including '(1) the age of the minor, (2) *the circumstances and gravity of the offense* committed by the minor, and (3) the minor's previous delinquent history.'" (*Gary B.*, *supra*, 61 Cal.App.4th at pp. 848-849.) In accordance with Welfare and Institutions Code sections 706 and 725.5, the circumstances and gravity of the offense were "to be extracted primarily from the probation officer's report and other evidence presented by the parties." (*Gary B.*, *supra*, 61 Cal.App.4th at p. 849.)

Agreeing with the reasoning of *Gary B.*, we conclude the juvenile court in the present case did not err by going behind the minor's admission and looking at his conduct to determine whether his offense was listed in Welfare and Institutions Code section 707(b).

Following the filing of the briefs in this case, the minor filed with this court a letter citing *People v. Hawkins* (2003) 108 Cal.App.4th 527 (*Hawkins*) as additional authority for his position. *Hawkins* is not on point.

In *Hawkins*, the court found that the defendant's conviction for battery with serious bodily injury (Pen. Code, § 243, subd. (d)) could never be a violent felony under Penal Code

section 667.5, subdivision (c)(8) (“[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in [Penal Code] Section 12022.7”). This was because section 12022.7, as it read at the time of *Hawkins*, precluded its application where great bodily injury was an element of the offense, unless the offense involved domestic violence. (*Hawkins, supra*, 108 Cal.App.4th at pp. 529-531.) Since *Hawkins* had nothing to do with Welfare and Institutions Code section 707(b)(14), it is of no aid to the minor.

In the instant case, the minor’s striking his brother’s head with a flashlight, causing a laceration four inches long, was an “[a]ssault by any means of force likely to produce great bodily injury” within the meaning of Welfare and Institutions Code section 707(b)(14). The minor’s contention to the contrary is not meritorious.

DISPOSITION

The judgment (order committing the minor to CYA) is affirmed.

RAYE, J.

We concur:

SCOTLAND, P.J.

SIMS, J.